Filed 12/8/15 In re M.C. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.C. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent; v. M.M., Defendant and Appellant.	E063513 (Super.Ct.Nos. J248370-73) OPINION

APPEAL from the Superior Court of San Bernardino County. Lynn Poncin, Judge. Affirmed.

Liana Serobian, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel and Adam E. Ebright, Deputy County Counsel, for Plaintiff and Respondent.

Four young children entered the dependency system based on parental substance abuse and criminal activity which resulted in their arrests and incarceration. At the six month review stage, the San Bernardino County Children and Family Services (CFS) recommended terminating services for both parents, and the court made findings that neither parent had participated in the case plan. However, due to the court's mistaken belief that father had not been granted services, no order terminating services was made as to him. After the court set the matter for selection and implementation hearing (Welf. & Inst. Code, § 366.26),[1] counsel was appointed for father. At the subsequent contested hearing, parental rights of both parents were terminated. Mother appealed.

On appeal, mother challenges the order terminating her parental rights on the ground that the error in failing to terminate services as to father infected the subsequent order terminating parental rights, rendering it void. We affirm.

BACKGROUND

Mother is the parent of E.C., age five at the time of the inception of dependency proceedings, C.C., age two, Ma. C., age eight months, and Mo.C., who was two months old. In January 2013, Mo. C. was born[2] at 28 weeks gestation with several medical problems requiring her continued hospitalization. Mother was incarcerated at the time of

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] Mother tested positive for methamphetamine at the time of delivery, although Mo. C. tested negatively. Mother, who was incarcerated, had been prescribed Labetalol, which is known to cause false positive results in toxicological screens. Labetalol is an anti-hypertension drug prescribed for pregnant women suffering from preeclampsia.

Mo. C.'s birth, and, a few days after giving birth, mother was returned to custody and later released. Within days of Mo. C.'s birth, a referral was made to CFS alleging caretaker absence or incapacity, because the parents visited the infant only three times after mother's release. However, the older children were returned to the parents' custody.

On three occasions thereafter, CFS attempted to get the parents to submit to drug tests, but the parents failed to do so, eventually leaving their motel in the maternal grandmother's truck. Based on the prior referrals, and the parents' failure to drug test, CFS decided to detain the children. On March 11, 2013, CFS filed dependency petitions on behalf of all four children, alleging parental neglect and inability to prove regular care due to the parents' substance abuse, based on the parents' histories of substance abuse, their history of domestic violence in the presence of the children, their extensive criminal backgrounds, and their neglect of Mo. C.'s medical treatment. Both parents were absent at the detention hearing, and the court did not appoint counsel for them at that time.

CFS submitted a report for the jurisdictional/dispositional hearing. The report noted that the parents failed to visit, or even to call to check on Mo. C.'s wellbeing while she was hospitalized for two months, failed to submit to drug tests, and were homeless. The social worker expressed grave concerns because the parents were in denial regarding their substance abuse, which in mother's case began when she was 18, in approximately 2002, given mother's birth year of 1984. The social worker was also concerned about the oldest child, E.C., who had "shut down," and seemed to be the forgotten child.

On April 2, 2013, the court held the combined jurisdictional and dispositional hearing, although both parents, as yet unrepresented by counsel, were absent. The court determined father was the presumed father, sustained the petition with true findings as to all allegations, found that the children came within the provisions of section 300, subdivision (b), removed custody from the parents, approved the reunification plan, and ordered the parents to participate in the plan.

In May 2013, the home of the paternal grandmother was approved, and the four children were placed with her. In September, 2013, CFS submitted a report for the six-month review hearing. In it, the social worker noted that both parents had been arrested in June 2013. Mother was sentenced to two years in prison for possession of controlled substances (methamphetamine) (Health & Saf. Code, § 11377, subd. (a)) and receiving stolen property (Pen. Code, § 496, subd. (a)), while father was sentenced to two years in county jail for possession of controlled substances (methamphetamine) (Health & Saf. Code, § 11377, subd. (a)), possession of marijuana for sale (Health & Saf. Code, § 11359, subd. (a)), and grand theft (Pen. Code, § 487, subd. (a)).

The report indicated neither parent had engaged in services, and mother had only visited the children twice in May 2013. The social worker recommended that services to both parents be terminated. Neither parent appeared for the six-month review hearing scheduled to be held on October 2, 2013. Counsel was appointed for mother, but not for father because of an immigration hold that had been imposed. The matter was set as a contested hearing by mother and discovery was ordered for mother's new attorney.

On November 5, 2013, neither parent was present again, although mother was represented by counsel, who requested additional reunification services on her behalf. The court was informed that father could not be located in custody, and it was assumed he had been deported because of the immigration hold that had been identified earlier. The minute order reflects that it was presumed that father was in I.N.S. custody.

Nevertheless, the court adopted the findings and recommendations contained in the CFS report, continued the children in their relative placement, and found by clear and convincing evidence that the parents had failed to complete the reunification plan. After finding reasonable services had been provided and that the parents had failed to make progress in the case plan, the court terminated mother's reunification services, but observed that father did not receive services. The court set a hearing pursuant to section 366.26, directed the clerk's office to send relevant forms to parents regarding the filing of a notice of intent to file a writ petition. Notice of the hearing pursuant to section 366.26 was served by mail on both parents.[3]

On March 3, 2014, CFS submitted its section 366.26 hearing report. The report noted that Mo. C. had certain medical and developmental issues, but that all four children remained in the relative placement with the paternal grandmother who was committed to adoption. The report also noted the strong attachments between the children and their

[3] On August 12, 2014, the social worker filed a proof of service on father by personal service.

grandmother. On the same date the report was filed, mother filed a Request to Change Court Order, pursuant to section 388.[4]

On June 5, 2014, the matter was on calendar for the section 366.26 hearing. County counsel informed the court that father had been sentenced to county jail and had been served with notice of the section 366.26 hearing, but that he did not have counsel. After, the bailiff investigated and reported that father had been released from local custody into ICE (Immigration and Customs Enforcement) custody.

Because father had only been notified by mail of the earlier hearing date in March, the court set the matter further out to effectuate service. On August 15, 2014, county counsel informed the court that father had been located at Glen Helen Rehabilitation Center, and that he was personally served with notice of the hearing. The court appointed counsel for the father.

On September 24, 2014, mother submitted another petition to modify a court order, this time seeking to vacate the section 366.26 hearing and to either set the matter for further review pursuant to section 366.22, or to implement a permanent plan of guardianship, rather than adoption. The court ordered a hearing on the petition. On September 26, 2014, CFS submitted additional information to the court indicating that some of Mo.C.'s developmental issues had resolved themselves, but that she had been referred to Inland Regional Center as a precaution. Ma.C. was seen by a doctor for a

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[4] This petition, prepared by mother herself, purported to seek an order setting aside a termination of parental rights. Because no termination of parental rights had been ordered yet, the court summarily denied that petition.

possible heart murmur, and C.C. was eligible for SSI based on past delays and issues and for speech services. E.C. received SART (Screening, Assessment, Referral, and Treatment Program) for depression. Nevertheless, the social worker indicated the children were doing well in their placement.

On January 9, 2015, mother's counsel submitted another request to change a court order pursuant to section 388. Counsel had requested in December 2014 that the previous petition be continued so it could be heard after mother's release from custody, and the court agreed. On February 3, 2015, at the pretrial hearing, father's counsel informed the court that father supported mother's efforts to obtain reinstatement of services. However, father's counsel also indicated father did not want the children to leave his mother's care, and if mother's petition was denied, he was in agreement with the plan of adoption by the paternal grandmother.

On March 16, 2015, the section 366.26 hearing had to be continued again because the court had never conducted an inquiry under the Indian Child Welfare Act as to father. At this same hearing, mother requested an evidentiary hearing on her most recent 388 petition, which was granted.

On April 30, 2015, the court heard and denied mother's 388 petition. Then the court conducted the hearing to select and implement the permanent plan (§ 366.26), where it found the children were adoptable, and terminated parental rights of both parents. Mother appealed.

DISCUSSION

1. *Mother May Not Revive Father's Non-Appealable Issues on Appeal Following Termination of Parental Rights.*

Mother argues that she may challenge the setting order (§ 366.21, subd. (e)), notwithstanding the failure to file a writ petition pursuant to rule 8.450, et seq., of the California Rules of Court because the statutorily mandated writ notice was defective. Specifically, she asserts that the court clerk failed to send her the written advisement, although she acknowledges the clerk sent her Judicial Council forms JV-820 (Notice of Intent to File Writ Petition and Request for Record), and JV-825 (Petition for Extraordinary Writ), ten days after the setting hearing. We disagree.

An order terminating reunification services and setting a section 366.26 hearing is not appealable unless an aggrieved party timely filed a petition for extraordinary writ review, substantively addressed the specific issues to be challenged and supported by an adequate record, which was summarily denied or otherwise not decided on the merits. (§ 366.26, subd. (*l*)(1), (2).) The purpose of the requirement to seek writ review is to support the state's interest in expedition and finality, and the child's interest in securing a stable, normal home. (*In re X.Z.* (2013) 221 Cal.App.4th 1243, 1249, citing *In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1022-1023.)

Section 366.26, subdivision (*l*) requires the court to advise all parties of the writ requirement in order to preserve any right to appeal such issues after terminating reunification services and issuing an order setting a section 366.26 hearing. (§ 366.26,

subd. (*l*)(3).) The advisement must be given orally to those present when the court orders the hearing, and within one day after the court make the order, the advisement must be sent by first-class mail by the clerk to the last known address of any party absent when the court makes the order. (Cal. Rules of Court, rule 5.590(b);[5] *In re X.Z.*, *supra*, 221 Cal.App.4th at p. 1250-1251.) Judicial Council form JV-820 contains an advisement of the need to file the notice of intent form to obtain appellate review of the writ petition and specific deadlines. (*In re A.H.* (2013) 218 Cal.App.4th 337, 347.)

Where the juvenile court fails entirely to advise a parent of his or her right to seek writ review of the setting order, claims of error relating to provision or termination of reunification services are cognizable on appeal from an order terminating parental rights. (*In re Rashad B.* (1999) 76 Cal.App.4th 442, 446 [sending notice and forms to "Addresses Unknown" resulted in no advisement of writ review sent to the parent]; *In re Cathina W.* (1998) 68 Cal.App.4th 716, 722-724 [notice and forms returned undelivered and clerk did not re-mail to mother at new address].) Thus, where a parent is not notified of the need to file a writ after a hearing where a setting order has been made, from which the parent was absent, the parent may challenge the court's termination of reunification services on appeal following the termination of parental rights. (*In re Lauren Z.* (2008) 158 Cal.App.4th 1102, 1110.)

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[5] In mother's reply brief, she states that both section 366.26, subdivision (*l*)(3)(A) and California Rules of Court, rule 5.590(b), impose a duty on trial counsel to give the writ advisements to parents absent from the setting hearing. We assume this was a typographical error for both provisions refer only to the trial court's notice duties.

Not every defect in the mailing of the notices and advisements of rights results in a failure to advise the aggrieved party of the right to seek writ review. The failure to include a zip code in the written advisement does not constitute a failure to mail the notice where the written advisement was not returned to the sender, indicating it was, indeed, received. (*In re T.W.* (2011) 197 Cal.App.4th 723, 731.) Thus, the key question is whether the parent received the notice.

Here, mother asserts the notice was served late, but the record does not show that she did not receive it, as there is no indication in the record it was returned to the court undelivered. Moreover, mother did not attempt to file a notice of intent to file a writ petition, so she cannot say that the late notice resulted in a dismissal, thereby prejudicing her right to seek writ review of the order.

Mother also emphasizes the use of the term "advisement" in both the statute and rule as if to suggest that a separate document explaining the parent's writ rights must be sent. However, mother points to no requirements that the writ advisement must be in a particular form or format and does not indicate how the information contained on the JV-820 form is inadequate. Judicial Council form JV-820 contains the statutory advisement. (See *In re A.H.*, *supra,* 218 Cal.App.4th at p. 347.)

Most importantly, even if we were to agree that she did not receive timely notice and advisement of the requirement of seeking writ review, she has not raised any issues pertaining to the termination of her reunification services or the findings that *she* failed to regularly participate in services and make substantive progress. She lacks standing to

challenge the setting order based on a procedural defect affecting father's rights. (*In re Harmony B.* (2005) 125 Cal.App.4th 831, 837-838 [father could challenge setting order due to defective notice, but grandmother lacked standing to appeal from termination of parental rights based on prior denial of placement].) In other words, a finding of lack of notice of the writ requirement following a setting order would permit mother to challenge only the termination of services as to her, not any errors pertaining to father.

In this respect, mother attempts to argue that the failure to terminate father's services at the time of the hearing when the court ordered the section 366.26 hearing constituted a jurisdictional defect rendering the setting order void. Here again, we disagree.

In its fundamental sense, "jurisdiction" refers to the court's power over persons and subject matter, that is, authority over the subject matter or the parties. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) "Lack of jurisdiction" is also the term applied to a case where, in a less fundamental sense, and despite jurisdiction over the subject matter and parties in the fundamental sense, it has no power to act except in a particular manner. (*Ibid.*; see also *In re Angel S.* (2007) 156 Cal.App.4th 1202, 1209.) Judicial errors of this type are described as acts "in excess of jurisdiction" which are not void in the fundamental sense, but are, at most, voidable if properly raised by an interested party. The fundamental type of jurisdiction can never be conferred by consent of the parties, while errors arising from judicial acts in excess of jurisdiction may be

subject to consent and waiver. (*In re Jesse W.* (2001) 93 Cal.App.4th 349, 359-360, citing *In re Christian J.* (1984) 155 Cal.App.3d 276, 279.)

A trial court's failure to follow statutory procedure did not render the order setting the section 366.26 hearing void, but only voidable if properly raised by an interested party. (*In re Z.S.* (2015) 235 Cal.App.4th 754, 770.) The court also made appropriate findings respecting father (that he was provided reasonable services, and that he failed to regularly participate or show substantive progress), but it mistakenly believed father had not been provided services in the first place, so it omitted to make an express order terminating his services.[6] This was not a fundamental error affecting the subsequent judgment terminating mother's parental rights.

As to father, the setting order may have been voidable, but he did not seek review of the setting order, and he did not appeal from the order terminating his parental rights. In fact, he consented to the termination of his parental rights in the event mother's petition to modify the setting order was denied. Additionally, he was present at the section 366.26 hearing, but he did not correct the trial court when it mistakenly referred to a prior order denying him reunification services.

As an order that was at most voidable, the failure to expressly terminate father's reunification services did not infect all subsequent rulings, or rulings affecting other parties. A voidable act or judgment is valid until it is set aside. (*People v. American*

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[6] There were other procedural oversights during the proceedings which should be prevented in future cases, including the delayed appointment of counsel to represent both parents, and the failure to timely inquire into father's possible Indian ancestry.

Contractors Indemnity Co. (2004) 33 Cal.4th 653, 660-661.) Principles of estoppel preclude collateral attack of such orders. (*Id.* at p. 661.) Only father could challenge the error of omission, and father forfeited any right to challenge it by failing to appeal from either the setting order, or the judgment terminating his parental rights. While mother may be considered an interested party, the error did not render the judgment void as to her. In any event, mother's services were properly terminated after appropriate factual findings. She makes no argument to the contrary. Further, at the section 366.26, she did not object to the termination of parental rights on the ground that father's services had never been terminated.[7] As to her, there was no error.

The judgment is now final as to father, and is binding on mother, who is precluded from collaterally attacking the setting order.

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[7] In certain situations, legal error may be raised for the first time on appeal. (*In re Alanna A.* (2005) 135 Cal.App.4th 555, 562.) But where purported errors could have been rectified in the trial court had an objection been made, they will not be considered on appeal. (*In re S.C.* (2006) 138 Cal.App.4th 396, 406.) This rule is grounded on considerations of fairness to the court and opposing parties because they would be deprived of opportunities to correct alleged errors and reviewing courts would be required to deplete costly resources to address errors that could have been rectified in the trial court if an objection had been made. (*Id.* at p. 406.) It is inappropriate to allow any party to trifle with the courts by standing silently by, thus permitting the proceedings to reach a conclusion in which the party could acquiesce if favorable and avoid if unfavorable. (*In re Urayna L.* (1999) 75 Cal.App.4th 883, 886.) Here, there were numerous hearings between the date of the hearing where setting order was made (November 5, 2013), and the date that the section 366.26 hearing was finally heard (April 30, 2015), presenting numerous opportunities to bring the oversight to the court's attention.

2. *There Is Substantial Evidence Supporting the Finding of Adoptability.*

Mother argues that the children were not generally adoptable because they were a sibling set of four children, and the children had special needs and developmental issues making them difficult to adopt. We disagree.

We review the juvenile court's adoptability determination for substantial evidence. (*In re Y.R.* (2007) 152 Cal.App.4th 99, 112, disapproved on a different point in *In re S.B.* (2009) 46 Cal.4th 529, 537.) In assessing the sufficiency of the evidence, we "presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) We do not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts. (*Ibid.*) The judgment will be upheld if it is supported by substantial evidence, even though substantial evidence to the contrary also exists and the trial court might have reached a different result had it believed other evidence. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

Before the juvenile court terminates parental rights and selects a permanent plan of adoption, it must find, by clear and convincing evidence, that it is likely the child will be adopted. (§ 366. 26, subd. (c)(1)). The issue of adoptability focuses on whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1231.) It is not necessary that the child already be in a potential adoptive home or that there be a

proposed adoptive parent "waiting in the wings." (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223, fn. 11.) Nevertheless, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1650.)

The law does not require a juvenile court to find a dependency child is "generally adoptable" before terminating parental rights; all that is required is clear and convincing evidence of the likelihood that the dependent child will be adopted within a reasonable time. (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1311-1312.) Such likelihood may be satisfied by a showing that a child is "generally adoptable," independent of whether there is a prospective adoptive family "waiting in the wings." (*In re Jayson T.* (2002) 97 Cal.App.4th 75, 85, disapproved on another ground in *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414.) But the juvenile court may properly consider a prospective adoptive parent's willingness to adopt as evidence the child is likely to be adoptable within a reasonable time. (*In re Sarah M., supra,* 22 Cal.App.4th at pp. 1649-1650.)

Here, the evidence established that the paternal grandmother was able to meet the children's needs and was willing to adopt them. Mother points to nothing in the record which refutes this evidence. There is substantial evidence to support the trial court's finding of adoptability.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

KING
J.

MILLER
J.